IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33192

GENERAL MOTORS ACCEPTANCE CORPORATION,

Appellant,

v.

D.C. WRECKER SERVICE and
KENNETH COX

Appellees.

BRIEF OF APPELLANT, GENERAL MOTORS ACCEPTANCE CORPORATION

APPEAL FROM THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 04-C-156
HONORABLE MICHAEL THORNSBURY, JUDGE

Respectfully Submitted,

Andrea K. Reynolds #8517
Counsel for Appellant
MAPOTHER & MAPOTHER, P.S.C.
845 Fourth Avenue, Ste. 701
Huntington, West Virginia 25701
(502) 271-4234

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KIND OF PROCEEDING AND NATURE OF THE RULING

This is an appeal from a Final Judgment Order of the Circuit Court of Mingo County, entered on February 10, 2006. The Order was the result of a bench trial held October 18, 2005, in which the Circuit Court awarded punitive damages to the Defendants/CounterPlaintiffs below, D.C. Wrecker Service and Kenneth Cox [hereinafter "Appellees"] on their counterclaim for statutory storage fees. Appellant, General Motors Acceptance Corporation [hereinafter "GMAC"], had filed a complaint for declaratory judgment and replevin on May 12, 2004, requesting that the Circuit Court determine the extent and priority of liens on one 2002 GMC Sierra, VIN 2GTEK19V021251046 (hereinafter "the vehicle"), and determine who was entitled to possession of the vehicle, as it was towed and held at Appellees' storage lot without the knowledge or consent of GMAC. The Complaint also sought replevin of the vehicle. The Complaint was later amended to include a cause of action for conversion when GMAC learned that the vehicle had been damaged while in Appellees' possession.

Appellees filed an Answer and Counterclaim, stating that Appellees were "engaged to tow and store the vehicle" and that GMAC had "failed to pay the lawful costs and expenses" associated with those services. Appellees stated no further cause of action, yet they asked for compensatory and punitive damages against GMAC.

Mediation of the case occurred on July 15, 2005. The mediation was unsuccessful on the issue of the amount of fees which should be paid to Appellees. However, Appellees did admit at that time that GMAC was entitled to possession of the vehicle and released the vehicle to GMAC shortly thereafter.

The Circuit Court of Mingo County held a bench trial of the matter on October 18, 2005, and issued the Final Judgment Order on February 10, 2006. GMAC petitioned for a direct appeal of that

order, and said petition was granted by this Court on or about September 21, 2006.

STATEMENT OF FACTS

On August 13, 2002, Randy Moore purchased the vehicle and executed a Retail Installment Contract, which was subsequently assigned to GMAC. GMAC properly recorded its security interest by recording a Title Lien Statement with the Pike County Clerk pursuant to Kentucky law. Mr. Moore was paying GMAC on a monthly installment basis.

On May 10, 2003, Mr. Moore was involved in an automobile accident with a third party. On that date, Respondent D.C. Wrecker Service, by its owner, Respondent Kenneth Cox, towed the vehicle to Appellees' storage lot after Mr. Moore requested that it be towed to his home, which was just down the street from the accident site. Mr. Cox informed Mr. Moore that he was required to tow the vehicle to his storage lot "for insurance purposes."

Although the third party to the accident was at fault, the insurance company initially denied coverage until Mr. Moore instituted a civil action against the third party. During this time, the vehicle remained at Appellees' storage lot. Mr. Moore continued to pay GMAC for a few months while the vehicle sat at the storage lot. At no time did anyone from D.C. Wrecker Service notify GMAC that they were in possession of the vehicle. In December, 2003, Mr. Moore ceased payment to GMAC and thus became in default under the Retail Installment Contract. The Contract provided that GMAC may take possession of the vehicle upon default.

In January, 2004, after Mr. Moore defaulted in his payments, GMAC discovered that the vehicle had been stored at D.C. Wrecker Service, and upon request for possession, Defendants demanded the sum of $5,000.00 from GMAC. Although contrary to state law which limits a secured party's payment for towing to the lesser of $1,500.00 or actual costs, Appellees refused to surrender

possession of the vehicle to GMAC for less than the $5,000.00 sum. Thereafter GMAC filed a Complaint in Mingo County Circuit Court for replevin of the vehicle. The Complaint asked the Circuit Court to make a declaratory judgment as to the extent and priority of the liens on the vehicle and to order possession of the vehicle to GMAC. Appellees filed an Answer and Counterclaim, stating that Appellees were "engaged to tow and store the vehicle" and that GMAC had "failed to pay the lawful costs and expenses" associated with those services. Appellees stated no further cause of action, yet they asked for compensatory and punitive damages against GMAC.

Following mediation of the case, Appellees released the vehicle to GMAC, leaving only the question of whether and to what extent GMAC owed Appellees for the towing and storage of the vehicle without the knowledge or consent of GMAC. Since Appellees refused to acknowledge that GMAC was entitled to possession of the vehicle until July, 2005, GMAC asked the Circuit Court for compensatory damages from Appellees in an amount equal to the depreciation of the vehicle from February, 2004, when request for possession was made by GMAC, until it was released in July, 2005. Such damages are authorized by W.Va. Code §55-6-6 ("it shall be the duty of the jury in such cases to ascertain and assess such damages as the plaintiff has sustained by reason of the detention of such property by the defendant").

The matter proceeded to bench trial on October 18, 2005. The Court heard the testimony of Respondent Kenneth Cox; Randy Moore; Randy Moore's girlfriend, Linda Tackett; and Kitty Boyette, a representative of GMAC. Respondent Kenneth Cox testified on behalf of himself and his business, D.C. Wrecker Service. He testified that he towed the vehicle to his storage lot at the request of Randy Moore. **[Trial Record at 8.]** Mr. Cox admitted that he did not notify GMAC at any time that the vehicle was in his possession. He further testified although he did believe that the vehicle was financed **[Record at 9]**, he never made any inquiry to state or county record keeping authorities

to determine who had a security interest in the vehicle, and never asked Mr. Moore who had a security interest in the vehicle. **[Record at 12-13.]** He testified that he never sent any documentary evidence of the fees he was attempting to charge GMAC. He could not recall how much money he asked GMAC for in January, 2004, but knew that it was around $5,000.00, which represented $45.00 for the tow and $20.00 per day for every day that D.C. Wrecker Service kept the vehicle. Mr. Cox admitted that there were no vehicles which he was unable to store at his lot due to the storage of the vehicle at issue in this case. **[Record at 12.]** Mr. Cox admitted that the passenger side window of the vehicle was damaged while in his possession, and stated that he admitted he was liable for that damage. He agreed that the window would cost approximately $200.00 to repair. **[Record at 15.]**

Randy Moore testified that he purchased the vehicle in 2002 and financed it through GMAC. Contrary to the testimony of Kenneth Cox, Mr. Moore testified that although Mr. Cox appeared at the accident site, Mr. Moore never requested a tow. **[Record at 20.]** He testified that at some point he noticed that Mr. Cox was loading his vehicle onto his tow truck, and asked Mr. Cox to take the vehicle to his home, which was about 500 feet from the accident site. **[Record at 21.]** Mr. Cox refused, stating that he had to take the vehicle so that "the insurance would pay off quicker." **[Id.]** Mr. Moore stated that he was never advised of how much the charges would be to tow or store the vehicle, and never received any documents regarding the storage of the vehicle. **[Record at 22.]**

Mr. Moore testified that his aunt tried to get the vehicle from D.C. Wrecker Service three to four weeks after the accident, but she advised Mr. Moore that Appellees wanted $5,000.00 to get the vehicle back. **[Record at 23.]** Mr. Moore testified that he ceased making payments in December, 2003 due to the $5,000.00 storage fee, which he stated he was not going to pay because he did not ask for the vehicle to be taken to D.C. Wrecker Service. **[Id.]** Mr. Moore testified that in December, 2003, GMAC contacted him about his missed payments. At that time, he gave GMAC information

regarding the location of the D.C. Wrecker Service lot and the fact that Mr. Cox wanted $4,500.00 to $5,000.00 to get the vehicle back. **[Record at 29-30.]**

Linda Tackett testified that she was a passenger in Mr. Moore's vehicle when the accident occurred, and was present when Kenneth Cox towed the vehicle. **[Record at 37.]** She testified that she heard Mr. Moore ask Mr. Cox to tow the vehicle to his home, but Mr. Cox stated that it needed to be taken to his lot "for insurance purposes." **[Record at 37.]** Ms. Tackett testified that Mr. Cox told Mr. Moore, "If the truck is on my lot then the insurance company will pay me faster." **[Id.]** Ms. Tackett did not recall any discussion of towing or storage charges. **[Record at 38.]**

Kitty Boyette, a field representative who has been employed by GMAC for 20 years, testified from her review of the business records of GMAC. She testified that on July 22, 2003, Randy Moore called GMAC and advised that the vehicle had been in an accident and that he was going to be filing a claim with an insurance company. He stated that the vehicle was at D.C. Wrecker Service. **[Record at 43.]** Ms. Boyette testified that GMAC took no action with regard to the vehicle because Mr. Moore continued making his payments, and therefore GMAC did not have the right to repossess the vehicle. GMAC presumed that Mr. Moore had thereafter obtained his vehicle from D.C. Wrecker Service. **[Record at 58.]** Ms. Boyette testified that GMAC first had the right to repossess the vehicle in January, 2004, upon Mr. Moore's default. **[Record at 59.]** It was only after Mr. Moore failed to make payments that GMAC learned that the vehicle had been at D.C. Wrecker Service since the time of the accident. Ms. Boyette testified that GMAC did not learn that the vehicle continued to be held at D.C. Wrecker Service or of the fees being incurred until February 26, 2004. On that date, an agent of GMAC was advised that Appellees would not release the vehicle unless the sum of $5,000.00 was paid. **[Record at 46, 53.]**

Throughout the litigation, GMAC informed Appellees, their counsel, and the Circuit Court

that it acknowledged that Appellees should be paid for towing the vehicle, but that the storage fees, if any, should be limited to $1,500.00 pursuant to W.Va. Code §38-11-3 ("if a person possessing an improver's lien on a motor vehicle releases that vehicle to a secured party taking possession after default, the secured party shall, upon redemption of the vehicle by the debtor or resale or other disposition by the secured party, pay to the improver the lesser of: (i) The actual cost of improvements as measured by the cost of inventory and labor; or (ii) fifteen hundred dollars. . . .") The institution of the action against Appellees was a simple request for the Circuit Court to apply the law. The Appellees' position that GMAC must pay $5,000.00 to retrieve a vehicle to which the secured party was entitled to possession, was in direct contravention to W.Va. Code 38-11-1 *et seq.*. The Circuit Court issued the Final Judgment Order on February 10, 2006.

The Circuit Court concluded that GMAC had no reason to know that the vehicle was being stored at D.C. Wrecker Service since the date of the accident, since Randy Moore continued to make loan payments to GMAC. However, the Circuit Court found that GMAC knew the vehicle was definitely being stored at D.C. Wrecker Service as early as January, 2004, when Mr. Moore stopped making payments. The Circuit Court held that GMAC gave "implied consent" for Appellees to store the vehicle for a reasonable charge (which the Circuit Court determined was $10.00 per day) from a purely arbitrary date, January 1, 2004, until July 22, 2005 when the vehicle was released by Appellees. The total amount of the storage charges found to be reasonable by the Circuit Court was $5,690.00, for 569 days of storage.

The Circuit Court agreed with GMAC in limiting GMAC's liability for the storage bill to $1,500.00. However, without stating any legal basis for doing so, the Circuit Court awarded punitive damages to Appellees in the amount of $4,500.00. The Circuit Court concluded:

GMAC was dilatory in contacting D.C. about the storage of the vehicle: GMAC

> knew the vehicle had been in an accident and was in storage on the D.C. lot, yet took seven to eight months to contact D.C., including two months after Mr. Moore ceased making payments. GMAC refused to post bond to recover the vehicle for eighteen months, with full knowledge that the vehicle was incurring a twenty-dollar daily storage fee and was rapidly depreciating in value. GMAC initiated the present litigation. GMAC acted willfully, wantonly and in gross disregard of the Defendant's [sic] statutory right to recover the fees associated with its improver's lien. GMAC is a large, international corporation with significant financial resources, while D.C. is a small, locally-owned and operated Wrecker service. GMAC avoided paying the storage fees, at the expense of D.C. and was aware that its actions were causing the Defendant harm, yet it continues [sic] its pattern of conduct for months. GMAC relies on the operation of a recently enacted statute to limit its liability to an amount that is only twenty-six percent of the amount this Court has found to be the reasonable storage fees due the defendant. The Court finds the Plaintiff, GMAC's conduct in this matter to be reprehensible, and hopes that an award of punitive damages will discourage GMAC from taking advantage of similarly situated storage lots in the future. Based on the totality of the circumstances and considering the Garnes factors, the Court FINDS and [sic] award of exemplary or punitive damages is clearly warranted in this matter. . . .

The Court's total judgment against GMAC was in the amount of $5,800.00 after deducting the sum of $200.00 for the damage that occurred while in Appellees' possession.

ASSIGNMENTS OF ERROR

1. Did the trial court err in awarding punitive damages when the only compensatory damages awarded were statutory in nature, when the Appellees failed to perfect their improver's lien, and where the Appellant's actions were not malicious, fraudulent, oppressive or grossly negligent?

2. Did the trial court err when it found that GMAC's actions were reprehensible when the evidence of record demonstrates that GMAC filed a civil action under a bona fide claim of right under W.Va. Code §38-11-1 *et seq.*?

3. Did the trial court err by awarding punitive damages to Appellees in an excessive amount, considering the factors set forth in Syllabus Points 2 and 3 of Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991)?

4. Did the trial court err when it found that GMAC gave implied consent to Appellees to store the vehicle from January 1, 2004 until July 22, 2005?

5. Did the trial court err when it failed to award GMAC compensatory damages for depreciation of the vehicle ?

DISCUSSION OF LAW

I. Standard of Review.

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." Dobbins v. Cunningham, 217 W.Va. 580, 618 S.E.2d 589 (2005) (citing Syl Pt. 1, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996)). However, this Court exercises complete and independent review over the circuit court's interpretation and conclusions of law. Phillips v. Fox, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995).

A circuit court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Board of Educ. v. Wirt, 192 W.Va. 568, 579 n. 14, 453 S.E.2d 402, 413 n. 14 (1994), quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, (1948).

II. The award of punitive damages was clearly erroneous and without evidentiary support of any malice, fraud, oppression or gross negligence of GMAC.

The trial court, although *agreeing* with GMAC's assertion that it was only required to pay Appellees the sum of $1,500.00, found that GMAC's conduct in instituting a declaratory judgment action to clarify its lien rights in the vehicle and compel Appellees to turn over the vehicle for the sum of $1,500.00 was "reprehensible." However, the evidence of record is completely devoid of any

showing of harm to Appellees or any evidence of malice, fraud, gross negligence, or intent to commit any harm to Appellees.

Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). Bowyer v. Hi-Lad , Inc., 216 W.Va. 634, 609 S.E.2d 895 (2002) (quoting Syl. Pt. 7, Alkire v. First National Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996)).

This Court set forth the factors to be considered in awarding punitive damages in Garnes, which sets forth the instructions which a Circuit Court should give to a jury:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Syl. Pt. 3, Garnes at 658, 413 S.E.2d at 899.

Furthermore, Garnes provides that "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors: (1) The costs of the litigation; (2) Any criminal sanctions imposed on the defendant for his conduct; (3) Any other civil actions against the same defendant, based on the same conduct; and (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff." Syl. Pt. 4, Garnes at 659, 413 S.E.2d at 900.

In order to show that the actions of GMAC were motivated only by a desire to clarify the application of the law and to encourage Appellees to follow the law, it is necessary to discuss the statutory basis for the action filed by GMAC. The common law "possessory liens" were long ago replaced by statutory liens of similar but expanded character. Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14, 217 S.E.2d 907 (1975). The statutory scheme for towing, storage, and mechanics' liens on personal property, collectively known as "improver's liens," is set forth in §38-11-1 et seq. Section 38-11-3 states that an improver's lien is only good against "the person who deposited the property with the lienor, and against any other person by whose authority or with whose consent the property was deposited." Furthermore, Section 38-11-2 provides: "Any lienor shall take such rights as a purchaser of the property deposited with him would take, and shall take subject to other titles, interests, liens or charges in the same manner that a purchaser would take. . . ."

Sections 38-11-2 and 38-11-3 gave Appellees the right to a lien on the vehicle which was good only against whoever deposited the property with them, and anyone "by whose authority or

with whose consent the property was deposited." The Circuit Court agreed that GMAC never consented to deposit of the vehicle with Appellees, and was never made aware by Appellees that the vehicle was sitting on the D.C. Wrecker Service lot for an extended period of time. Had Appellees followed the procedure set forth in W.Va. Code §38-11-14 to assert an improver's lien on the vehicle (see infra), GMAC would have been aware that storage charges were being incurred and would have been able to gain possession of the vehicle before the statutory limit of $1,500.00 in storage charges was reached.

Pursuant to the improver's lien statutes and this Court's interpretation thereof, the outstanding storage bill was not GMAC's responsibility, nor was GMAC's right to possession dependent upon payment of the balance due. Yet Appellees, after failing to take any steps to determine who had an interest in the vehicle despite Mr. Cox's belief that the vehicle was financed, then expected GMAC to pay the sum of $5,000.00 in order to gain possession of the vehicle, to which GMAC was lawfully entitled.

In Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14, 217 S.E.2d 907 (1975), this Court upheld the Circuit Court's order which required the storage company to release property to the plaintiff, who held a lien on the Certificate of Title to the property. The Court stated: "Sections 38-11-2 and 38-11-3 read in pari materia, is a lien-creating statute which expressly subordinates the priority of an improver's lien created thereby to that of a prior perfected security interest and other prior liens of which the improver had actual or constructive notice." This Court cited the Fruehauf decision favorably in Bank of White Sulphur Springs v. Patriot Ford Lincoln-Mercury Inc., 191 W.Va. 339, 445 S.E.2d 522 (1994) when upholding the circuit court's decision to give the right of possession to the prior perfected lienholder over a storer or improver claiming a lien.

Appellees had constructive notice of the security interest of GMAC. The recording of a lien in accordance with applicable state law provides notice to all interested parties that the lienholder has a security interest in the property described. Such public record provides constructive notice to any party who has an interest in knowing what parties, if any, have a lien on a piece of personal property. All of this information was accessible to Appellees, yet they failed to take any steps to ascertain who the lienholder was, despite Kenneth Cox's admission at trial that he knew that some party must have had a security interest in the vehicle. It is not an undue burden to expect purported improver's lienholders to make a simple and inexpensive inquiry to local record keeping authorities and put themselves on actual notice of a lienholder who may be entitled to immediate possession of the vehicle.

Furthermore, Appellees' lien was never set out in accordance with the appropriate statutory provisions. Section 38-11-3 provides that an improver's lienholder only has a lien "to the extent and in the manner provided for in [38-11-14]." Section 38-11-14 states as follows:

> Any person holding personal property in his possession under a lien or pledge may satisfy such lien in any manner agreed upon between the owner and the lienor or, if there be no such agreement, in the following manner: The lienor or pledgee shall give a written notice to the person on whose account the goods are held and to any other person known by the lienor to claim an interest in the goods. . . .

Appellees never performed any of the actions required to maintain an improver's lien on the vehicle, and instead sat on their rights until GMAC learned that the vehicle was at D.C. Wrecker Service. Then Appellees expected GMAC to pay for Appellees' own lack of diligence by tendering $5,000.00 to them in exchange for possession of the vehicle.

Although the Code provides that the improver's lienholder may retain possession until their bill is paid, amendments to the improver's lien statutes recognize the obvious superior right to possession of a prior perfected lienholder such as GMAC. In 2001, four provisions were added to

Section 38-11-3. The first proviso limits the charges of a secured party taking possession after default to the lesser of (i) The actual cost of improvements as measured by the cost of inventory and labor; or (ii) fifteen hundred dollars. The amendment also states that the secured party shall pay the improver **only upon redemption or other disposition of the vehicle.** (emphasis added) Although not specifically stated, the improver's lien statutes make it clear that improvers should not be allowed to hold personal property and sit on their rights to the detriment of other parties. W.Va. Code §38-11-14 ("Unless a suit to enforce any lien authorized by this article be brought in a court of competent jurisdiction within thirty days after the delivery of the notice hereinabove provided for, such lien shall be discharged.")

Appellees refused to accept the statutory authority and the interpretations thereof made by the Supreme Court of Appeals in the past, which left GMAC no choice but to allow Appellees to keep a nearly new vehicle; pay Appellees' outrageous storage bill to obtain the vehicle (which would have been much less had Appellees fulfilled their statutory duties in asserting their lien); or request clarification and interpretation of the law from the Circuit Court. GMAC chose to ask the Circuit Court to intervene to minimize its own losses, and so that Appellees would know the limits of charges which could be made against a secured creditor in the event that a similar situation arises in the future.

Under West Virginia law, the trial court failed to apply any proper legal basis for awarding punitive damages to Appellees, and in fact it seems that the trial court used the Garnes case as a legal basis for awarding punitive damages, rather than using the Garnes analysis to determine the extent of punitive damages once a legal basis was established. The record in this case shows that the trial court had no legal basis to award punitive damages.

This Court long ago held that punitive damages are allowed only where there has been

malice, fraud, oppression, or gross negligence. Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895). Even a wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages. See Syl. Pt. 3, Jopling v. Bluefield Water Works & Improvement Co., 70 W.Va. 670, 74 S.E. 943 (1912). Therefore, in order for the award of punitive damages in this case to be proper, Appellees would have had to show that GMAC's actions were malicious, fraudulent, oppressive or grossly negligent. The evidence of record does not support such a finding.

As part of its justification for the award of punitive damages, the Circuit Court stated, "GMAC knew the vehicle had been in an accident and was in storage on the D.C. lot, yet took seven to eight months to contact D.C., including two months after Mr. Moore ceased making payments." Final Judgment Order at 8. Yet this conclusion was contradictory to the Court's earlier statement that, although GMAC was notified in July 2003 that the vehicle was then at D.C. Wrecker Service, GMAC had no reason to contact Mr. Cox or D.C. or to expect to incur storage fees, since Randy Moore was making his regular payments (Final Judgment Order at 5).

The second justification for an award of punitive damages was that "GMAC refused to post bond to recover the vehicle for eighteen months, with full knowledge that the vehicle was incurring a twenty-dollar daily storage fee and was rapidly depreciating in value." Final Judgment Order at 8. Again, this is directly contradictory to the Court's earlier statement that GMAC would have no reason to believe that the vehicle was even being stored at D.C. Wrecker Service, let alone incurring a daily storage fee, since Randy Moore continued to make payments to GMAC. Furthermore, the Circuit Court failed to specifically state what kind of bond it envisioned GMAC posting. GMAC did ask for an order of pre-judgment seizure pursuant to W.Va. Code §55-6-1 *et seq.* in its Complaint; however, the detinue statutes provide that pre-judgment seizure will only be granted if "there is a substantial probability that the plaintiff will prevail upon trial of the action upon the

merits." See W.Va. Virginia Code §55-6-2. Given the fact that Appellees filed a counterclaim, however vague, GMAC did not believe that a motion for pre-judgment seizure would be successful. Finally, the fact that the vehicle was rapidly depreciating was in no way harmful to Appellees. At no time did the storage fees even come close to exceeding the value of the 2002 GMC Sierra. The only party harmed by the depreciation of the vehicle was GMAC, which needed to repossess and sell the vehicle in order to minimize the losses caused by Mr. Moore's payment default.

The third justification for an award of punitive damages was that "GMAC acted willfully, wantonly and in gross disregard of the Defendant's [sic] statutory right to recover the fees associated with its improver's lien." Final Judgment Order at 8. The Circuit Court failed to note that Appellees, in order to ever legally realize any recovery on their storage fees, would have had to follow the statutory procedures set forth in W.Va. Code §38-11-14, which involves giving notice to parties with an interest in the vehicle, filing a civil action, obtaining a judgment for the outstanding storage fees, and selling the vehicle in order to satisfy the storage lien. GMAC did not put the Appellees through any more trouble than it would have been for Appellees to properly assert their lien in the first place.

The fourth justification the Circuit Court gave for the award of punitive damages was that "GMAC is a large, international corporation with significant financial resources, while D.C. is a small, locally-owned and operated Wrecker service." This is not in any way relevant to a finding that punitive damages were appropriate and allowed by any law, but rather is a factor to consider once it is determined that punitive damages are justified. Either way, there is no evidence of record of the financial status of either party.

The fifth justification given by the Circuit Court for the punitive damages award was that "GMAC avoided paying the storage fees, at the expense of D.C. and was aware that its actions were causing the Defendant harm, yet it continues [sic] its pattern of conduct for months." The record is

devoid of any evidence of harm caused to the Appellees by being deprived of the $1,500.00 to which Appellees were legally entitled. GMAC offered $1,500.00, more than once, to Appellees to release the vehicle, but Appellees would not accept less than $5,000.00. Furthermore, Mr. Cox admitted at trial that there were no other vehicles that he was unable to store because of the storage of the vehicle at issue in this case. No evidence of harm to Appellees was shown at trial.

The sixth justification given by the Circuit Court for the award of punitive damages was that "GMAC relies on the operation of a recently enacted statute to limit its liability to an amount that is only twenty-six percent of the amount this Court has found to be the reasonable storage fees due the defendant." First, had GMAC chosen to leave the vehicle at D.C. Wrecker Service indefinitely, GMAC had no duty to Appellees to pay any storage fees whatsoever. Second, the "recently enacted statute" was enacted in 2001, two years prior to the vehicle being taken to the D.C. Wrecker Service lot. The $1,500.00 limitation was not a new amendment which came into being only after GMAC filed its action. Rather, the whole point of GMAC's filing the action was that Appellees refused to recognize the superior right of GMAC to possession of the vehicle, and that GMAC had to pay only $1,500.00 to Appellees *after* it disposed of the vehicle at a repossession sale. §38-11-3.

The record is devoid of any showing whatsoever of malice, fraud, oppression or gross negligence which would justify an award of punitive damages. Furthermore, even if somehow the actions of GMAC were wrongful, the civil action was instituted under a bona fide claim of right with no malice whatsoever, and therefore punitive damages cannot lie. Jopling, Id.

III. The evidence of record demonstrates that GMAC filed a civil action under a bona fide claim of right under W.Va. Code §38-11-1 *et seq.* and such conduct was not reprehensible.

A wrongful act done under a bona fide claim of right and without malice in any form

constitutes no basis for punitive damages. See Syl. Pt. 3, Jopling v. Bluefield Water Works & Improvement Co., 70 W.Va. 670, 74 S.E. 943 (1912); See also McCormick v. Allstate Ins. Co., 202 W.Va. 535, 505 S.E.2d 454 (1998); Davis v. Celotex Corp., 187 W.Va. 566, 420 S.E.2d 557 (1992). The evidence of record supports no finding of a "wrongful act" committed by GMAC, let alone one committed with malice.

The Circuit Court found that GMAC's assertions in this matter were *correct* in agreeing that the storage fees were limited to $1,500.00, yet decided that GMAC's conduct in filing the declaratory judgment action was "reprehensible" and awarded punitive damages to Appellees. In essence, the Circuit Court found that the request by GMAC to enforce a *correct* application of the law was a wrongful act which was "reprehensible." Surely GMAC's request to the Circuit Court to apply and enforce the law was an action taken under a "bona fide claim of right," since the Circuit Court found in favor of GMAC on the issue of the statutory limitation of the storage fees. Furthermore, the record shows no evidence of any malicious behavior on GMAC's part, and accordingly the finding by the Circuit Court is clearly erroneous.

IV. The trial court's excessive award of punitive damages was an abuse of discretion in the absence of evidence supporting the factors set forth by this Court in Garnes.

This Court has stated that upon petition, it will review all awards of punitive damages. Vandevender v. Sheetz, Inc., 200 W.Va. 591, 490 S.E.2d 678 (2004); Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). In reviewing an award of punitive damages, this Court has stated that it will consider the same factors required by the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of Garnes with particularity. Appellant submits the analysis of each factor of Syllabus Pt. 3 and 4 of Garnes below,

with summaries of the evidence of record before the trial court:

> **Syllabus Point 3(1): Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.**

The trial court found that harm had been caused to Appellees, but as discussed *supra*, the record contains no evidence of harm to Appellees, or any potential harm to Appellees. Appellees were deprived of the sum of $1,500.00 at most, since that is the maximum that GMAC as a secured party was responsible for paying Appellees. Furthermore, had Appellees fulfilled their statutory duty to assert their improver's lien, they would have received their storage charges in a timely manner. There is no evidence of record of the financial condition of Appellees or how the loss of $1,500.00 affected Appellees' business. Rather, harm was caused to GMAC, which was deprived of the opportunity to repossess and sell the vehicle to minimize its losses under the retail installment contract with Randy Moore, until the vehicle had greatly depreciated in value.

> **Syllabus Pt 3(2): The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.**

As discussed earlier herein, there was no evidence sufficient to make a determination that GMAC's conduct was "reprehensible." The trial court found GMAC's actions in requesting a proper application of the law by the Circuit Court to be reprehensible, in essence concluding that GMAC should have just paid Appellees' outrageous fees instead of asserting its rights under the law. Any harm caused to Appellees (none of which was established at trial) was of their own doing, in failing

to notify GMAC of the storage of the vehicle and the fees Appellees intended to assess. Furthermore, the length of time that GMAC's actions continued were out of GMAC's control, inasmuch as the Circuit Court entered a time frame order setting a trial for a specific date. The trial date was extended for a few months by agreement of both parties. *Appellees* controlled how long they were deprived of the fees to which they were lawfully entitled by refusing to accept that GMAC was entitled to the vehicle in exchange for the statutory limit of $1,500.00.

GMAC made no attempt to "conceal or cover up" its actions in requesting the vehicle's return to GMAC's lawfully entitled possession. Furthermore, Appellees offered no documentary or testimonial evidence whatsoever of any similar acts by GMAC. Finally, GMAC did offer a fair and reasonable settlement to Appellees to receive the vehicle, considering that the trial court found that GMAC's application of the improver's lien statutes was *correct*.

> **Syllabus Pt. 3(3): If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.**

GMAC did not profit from the Appellees' unlawful retention of the vehicle. As previously stated, the vehicle depreciated and was damaged while in Appellees' possession.

> **Syllabus Pt. 3(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.**

The punitive damages of $4,500.00 were three times the amount that the trial court found for compensatory damages. Although in some punitive damages cases, an award of three times the amount of compensatory damages would be reasonable; however, with the lack of a legal basis for punitive damages, this ratio is not reasonable.

The trial court also noted that GMAC used a "recently enacted statute" to "limit its liability to an amount that is only twenty-six percent of the amount this Court has found to be the reasonable storage fees due to [Appellees]." First, had Appellees conducted one of any number of simple

inquiries to determine who had a security interest in the vehicle (as Mr. Cox testified that he believed that someone had a security interest in the vehicle), the "reasonable storage fees" would have been much less. GMAC would have been put on notice that the vehicle was at D.C. Wrecker Service from the time of the accident forward, and would have been able to take action to reduce the storage fees. However, as discussed below, the "reasonable storage fees" found by the trial court were in error, as the trial court improperly found that GMAC had given implied consent to Appellees to store the vehicle from January 1, 2004 until July 22, 2005 when the vehicle was released. Assuming *arguendo* that such "implied consent" was given in the first instance, any implied consent would be withdrawn when GMAC filed the declaratory action on May 12, 2004. Therefore, the actual fees based upon the "implied consent" of GMAC to store the vehicle would have been 132 days (from the arbitrarily selected "implied consent" day until May 12, 2004), instead of the 569 days charged by the Circuit Court. Given the finding of the Circuit Court that $10.00 per day for storage was a just and reasonable charge, the actual storage fees owed by GMAC would have been $1,320.00 - less even than the statutorily imposed limit prescribed in §38-11-3. Accordingly, the punitive damages bear no rational relationship to the compensatory damages which should have been found by the trial court.

Syllabus Pt. 3(5): The financial position of the defendant is relevant.

The trial court wrote, "GMAC is a large international corporation with significant financial resources, while D.C. is a small, locally-owned and operated Wrecker service." Undoubtedly, GMAC is a large international corporation; however, there was no evidence presented of GMAC's financial position, and thus the trial court erred in assuming that GMAC has "significant financial resources."

Syllabus Pt. 4(1): The costs of the litigation

The record contains no evidence of the costs of the litigation to Appellees. A review of the docket shows that Appellees did not incur any costs of litigation to answer discovery or appear for depositions, and Appellees did not even trouble themselves to make a disclosure of fact witnesses or file a pretrial memorandum to assist in clearing up evidence issues and other preliminary matters. In fact, Appellees' counsel failed to appear at a status conference set by the trial court, to which GMAC's counsel had to travel two hours one-way to attend. Furthermore, there is no evidence of the cost of this litigation to Appellees, if anything. It is entirely possible that Appellees paid nothing for their legal representation. Such evidence was not given by Appellees at trial, and accordingly it should not be considered.

Syllabus Pt. 4(2): Any criminal sanctions imposed on the defendant for his conduct

Since the actions of GMAC in this matter were not remotely criminal and were in fact legally proper, this factor was apparently not taken into consideration, although the trial court did not state as much.

Syllabus Pt. 4(3): Any other civil actions against the same defendant, based on the same conduct

No evidence of any other civil actions against GMAC was presented by the Appellees, and therefore this factor could not be considered.

Syllabus Pt. 4(4): The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.

As stated herein, there was no evidence of any malice, fraud, oppression or gross negligence by GMAC. A clear wrong was not committed in this instance; in fact, the trial court found that GMAC was *right*, but awarded punitive damages. GMAC made numerous offers of $1,500.00 (and higher) to Appellees in exchange for the vehicle, and Appellees refused to accept. What would have

been a "fair and reasonable settlement" when it was ultimately determined by the trial court that the amount owed to Appellees was $1,500.00? Anything in excess of that amount would not be fair to GMAC.

Taking into consideration the Garnes factors above, it is clear that the punitive damages award was excessive and unjustified by any evidence presented by Appellees.

V. The trial court erred when it found that GMAC gave implied consent to Appellees to store the vehicle from January 1, 2004 until July 22, 2005.

The Circuit Court found that in January, 2004, GMAC had actual knowledge that the vehicle was being held at D.C. Wrecker Service when it directed a representative to inspect the vehicle, and that on February 26, 2004, GMAC demanded return of the vehicle. Final Judgment Order at 5. However, the Circuit Court went on to find that "the actions of GMAC act as an implied consent for D.C. to retain the vehicle, effective on January 1, 2004 (a date in January arbitrarily selected by the Circuit Court), and the lien is enforceable against GMAC from that period." Appellees did not acknowledge that GMAC was entitled to possession of the vehicle until the mediation occurred on July 15, 2005, and released the vehicle on July 22, 2005. The Complaint in this matter was filed by GMAC on May 12, 2004. Any "implied consent" to store the vehicle which was allegedly given in January, 2004 would have ended when the Complaint was filed on May 12, 2004.

Assuming *arguendo* that such "implied consent" was given, the actual fees based upon the "implied consent" of GMAC to store the vehicle would have been 132 days (from the arbitrarily selected "implied consent" day until May 12, 2004), instead of the 569 days charged by the Circuit Court. Given the finding of the Circuit Court that $10.00 per day for storage was a just and reasonable charge, the actual storage fees owed by GMAC would have been $1,320.00 - less even

than the statutorily imposed limit prescribed in §38-11-3. Accordingly, the trial court's finding of "implied consent" to store the vehicle from January 1, 2004 until July 22, 2005 was clearly erroneous.

VI. The trial court erred when it failed to award GMAC compensatory damages for depreciation of the vehicle.

The trial court found that "it is undisputed that GMAC has a perfected security interest in the vehicle and that as a subsequent lien holder D.C. took possession of the property subject to the rights of GMAC." However, using an analysis of bailments, the trial court found that Appellees did not cause any depreciation of the vehicle through negligence, and that the vehicle was only in possession of the Appellees for an extended period of time due to the actions of GMAC. Final Judgment Order at 9.

In Biederman, Inc., v. Henderson, 115 W.Va. 374, 176 S.E. 433 (1934), this Court held: "Unless circumstances justifying a departure from it are shown, the rule for determining the amount of damages for injury to personal property is to subtract the fair market value of the property immediately after the injury from the fair market value thereof immediately before the injury, the remainder, plus necessary reasonable expenses incurred, being the damages." See Ripley v. C. I. Whitten Transfer Co., 135 W.Va. 419, 63 S.E.2d 626 (1951); H. B. Agsten & Sons, Inc., v. United Fuel Gas Co., 117 W.Va. 515, 186 S.E. 126 (1936); Tingler v. Lahti, 87 W.Va. 499, 105 S.E. 810 (1921).

The depreciation of the vehicle from the time that GMAC requested possession of the vehicle until the time the vehicle was actually released by Appellees was established by GMAC's representative, Kitty Boyette. She testified that she had experience in determining the value of vehicles by using the Official Used Car Guide published by the National Automobile Dealers

Association [NADA], which is a widely accepted commercial publication relied upon by the general public and by persons who work in the field of vehicle sales and financing guide. Ms. Boyette testified that the vehicle depreciated in value by $1,925.00 while in Appellees' wrongful possession, and true and accurate copies of the relevant pages of the NADA guidebooks for the months of February, 2004 and July, 2005 were admitted by the trial court.

The Appellees, after asserting their Counterclaim for "lawful storage fees," could have immediately released the vehicle to GMAC, but despite numerous requests, failed to do so until the mediation in July, 2005. The Appellees' continued possession of the vehicle until July, 2005 was wrongful and in negligent disregard for GMAC's superior right of possession, and caused damage to GMAC in the form of depreciation. Accordingly, the trial court's finding that the vehicle was only in Appellees' extended possession due to the actions of GMAC was clearly erroneous and should be reversed.

PRAYER FOR RELIEF

Wherefore, for all of the foregoing reasons, GMAC prays that this Court reverse the Final Judgment Order of the Circuit Court of Mingo County in part and remand with directions to strike the award of punitive damages and award GMAC $1,925.00 in compensatory damages, plus its costs of suit and for other relief which this Court may deem appropriate.

Andrea K. Reynolds #8517
Counsel for Appellant
MAPOTHER & MAPOTHER, P.S.C.
845 Fourth Avenue, Ste. 701
Huntington, WV 25701
(502) 271-4234

CERTIFICATE

I hereby certify that a true and accurate signed copy of the foregoing Petition for Appeal has been served, by United States Mail, postage prepaid, to Greg K. Smith, Counsel for Appellees, P.O. Box 1037, Williamson, West Virginia, 25661 on this 30 th day of October, 2006.

Andrea K. Reynolds